

To: Reynolds, Rebekah[Reynolds.Rebekah@epa.gov];
Wade.H.Hargrove@hawaii.gov[Wade.H.Hargrove@hawaii.gov]
From: Daugherty, Steven A CIV NAVFAC Pacific, 09C
Sent: Fri 11/20/2015 9:18:08 PM
Subject: RE: Non-Disclosure DRAFT Response to BWS
[smime.p7s](#)

Rebekah/Wade,

Below is a draft of the response I am preparing to send out to BWS outside counsel; CAPT Tufts requested that I give you a heads up and an opportunity to discuss before sending. I will try to call shortly or you can call me. I am trying to get this out by early afternoon.

" Jim,

I have reviewed the draft memorandum that you provided on 18 November as a proposed alternative to the Certificate of Non-Disclosure and Conflict of Interest Statement (NDA) provided to the Board of Water Supply on 9 November, and have discussed with my clients and contracting officers. After a thorough review of the issue, we are unable to agree with your suggested approach or with the relaxed substantive standards reflected in your proposed guidance which we feel would constrain full and open technical dialog in the scoping process.

The NDA that we provided is designed to ensure that each BWS employee who serves as a technical advisor or consultant on matters related to the implementation of the Red Hill Administrative Order on Consent (AOC) is aware of and intends to comply with the requirements of the Procurement Integrity Act and implementing regulations as well as the requirements of the AOC. The provided NDA reflected our attempt to simplify the NDAs and other agreements required of our own employees and contractors. We feel that this individual understanding and commitment is vital to the integrity of the procurement process and to successful implementation of the AOC, especially for individuals who do not routinely participate in such processes.

While we have agreed to a guidance approach for the regulatory agencies; we do not feel such an approach is appropriate or adequately enforceable for a semi-autonomous non-regulatory entity for several reasons:

- . Federal regulatory agencies are subject to the same requirements of the Procurement Integrity Act and Federal Conflict of Interest Statutes and Regulations as the Navy and DLA regardless of whether an NDA is signed.

- . Federal and State Regulatory agencies have routine access to many otherwise privileged federal records under numerous environmental statutes and have demonstrated histories of compliance with statutory and regulatory limitations, including HRS 342L-15, and HRS 92F-13, on their use and disclosure of such information.

- . Federal and State Regulatory Agencies are bound by the terms of the AOC executed by the Parties.

- . BWS is not a regulatory agency, does not routinely have access to federal documents, does not have the same direct statutory and regulatory restrictions on use and disclosure of information that are applicable to federal and state regulatory agencies, and is not directly bound by the requirements of the AOC.

We also feel that the substantive provisions of your suggested guidance which attempt to more precisely pin down what data is protectable and which purport to allow direct release of privileged information by the BWS is inappropriate. The AOC defines the types of information that may be subject to a privilege claim and provides a mechanism for the Parties to the AOC to resolve any dispute regarding whether a claim is properly asserted. As discussed in our teleconference on Monday, under our NDA, for written communications, only information that is marked as privileged would be subject to disclosure limitations, and the Navy/DLA would be amenable to widespread release of some otherwise privileged source selection information where release information where it is determined that release will not threaten the

integrity of the government procurement process, however, any release of information marked as privileged would need to be arranged by the Parties. We cannot agree to any process that allows a non-party to make decisions regarding release of information that is marked as privileged under the AOC.

We hope that your clients will re-review our NDA in light of our earlier discussions. In order to ensure that base access can be arranged in time for the next round of scoping meetings we will need your list of proposed participants along with driver's license info for each participant and signed NDA's no later than close of business on Monday November 23.

v/r,"

v/r,

Steven Daugherty
Associate Counsel, NAVFAC PAC

(b) (6)

-----Original Message-----

From: Reynolds, Rebekah [mailto:Reynolds.Rebekah@epa.gov]

Sent: Thursday, November 19, 2015 12:14 PM

To: karen.glasgow@sol.doi.gov

Cc: Wade.H.Hargrove@hawaii.gov; Daugherty, Steven A CIV NAVFAC Pacific, 09C

Subject: [Non-DoD Source] Non-Disclosure

Hi Karen,

I know that call I proposed on Tuesday was canceled. I'm wondering whether you have any outstanding questions on the form that Navy has drafted for USGS employees who receive confidential information through their work on Red Hill to sign.

I know my clients would really like USGS employees participate in the scoping meetings at the end of the month.

If you have any questions about the form, I'd be happy to schedule a call.

Best,

Rebekah Reynolds

Assistant Regional Counsel

Office of Regional Counsel

Environmental Protection Agency - Region 9

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